



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MAHN  
ATTORNEY GENERAL

Honorable Harry Schultz  
County Attorney  
Dallam County  
Dalhart, Texas

Dear Sir:

Opinion No. 0-1563  
Re: Under Article 793, Code  
of Criminal Procedure,  
when a defendant is con-  
victed of a misdemeanor  
and is able to pay his  
fine and costs, but he  
elects to satisfy same by  
imprisonment in jail, is  
he entitled to credit on  
his fine and costs at the  
rate of \$3.00 per day?

Your request for an opinion on the above stated  
question has been received by this department.

Your letter reads, in part, as follows:

"Under Article 793, Revised Code  
of Criminal Procedure, when a defend-  
ant is convicted of a misdemeanor and  
is able to pay his fine and costs, and  
same could be satisfied by levying on  
his property subject to execution, but  
he elects to satisfy such fine and  
costs by imprisonment in jail, is he  
entitled to credit on his fine and  
costs at the rate of \$3.00 per day as  
declared by your Opinions Numbers  
0-338 and 0-441?

"Considering the language of Ar-  
ticle 793, Code of Criminal Procedure,  
reading "if he is unable to pay the  
fine and costs adjudged against him"  
in connection with this state of facts,  
it is my impression and opinion that

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your opinions were not rendered in connection with or meant to apply in such a case as related."

In the case of Ex parte Gussie Ferguson, decided October 25, 1939 (not yet reported), the Court of Criminal Appeals held that Article 793, Code of Criminal Procedure, as amended by Acts of the Forty-first Legislature, First Called Session, and Article 794a, 794b, 794c, and 794d, Code of Criminal Procedure, are in contravention of both the State and Federal Constitutions, and that the general law providing Three (\$3.00) Dollars per day credit is now in effect and of force in all the counties in the State where a defendant is convicted of a misdemeanor, and his punishment is assessed as a pecuniary fine.

Article 793, Code of Criminal Procedure, before being amended reads as follows:

"When a defendant is convicted of a misdemeanor and his punishment is assessed as a pecuniary fine, if he is unable to pay the fine and costs adjudged against him, he may for such time as will satisfy the judgment be put to work in the workhouse, on the county farm, or public improvements of the county, as provided in the succeeding Article, or if there be no such workhouse, farm or improvements, he shall be imprisoned in jail for a sufficient length of time to discharge the full amount of fine and costs adjudged against him; rating such labor or imprisonment at Three (\$3.00) Dollars for each day thereof."

Article 783, Code of Criminal Procedure, reads as follows:

"When the defendant is only fined the judgment shall be that the State of Texas recover of the defendant the amount of such fine and all costs of the prosecution, and that the defendant, if present, be committed to jail until such fine and costs are paid; or if the defendant be not present, that a capias forthwith issue, commanding

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the sheriff to arrest the defendant and commit him to jail until such fine and costs are paid; also, that execution may issue against the property of such defendant for the amount of such fine and costs."

that: Article 787, Code of Criminal Procedure, provides

"When a judgment has been rendered against a defendant for a pecuniary fine, if he is present, he shall be imprisoned in jail until discharged as provided by law. A certified copy of such judgment shall be sufficient to authorize such imprisonment."

follows: Article 785, Code of Criminal Procedure, reads as

"When the judgment against a defendant is for a fine and costs he shall be discharged from the same:

"1. When the amount thereof has been fully paid.

"2. When remitted by the proper authority.

"3. When he has remained in custody for the time required by law to satisfy the amount thereof."

It will be noted that the above mentioned statutes provide that a judgment for a fine and costs may be discharged either by payment, by remission by the proper authority, or by remaining in custody for the time required by law to satisfy the amount thereof, that if the defendant is present and fails to make payment he shall be imprisoned in jail until discharged as provided by law, and that if he is absent a capias shall be issued for his arrest, and that the judgment may be enforced by an execution.

Referring to Title 15, Chapters 1 to 4, inclusive, and other provisions relating to costs in criminal cases, and execution of judgment in such cases, we quote from Texas Jurisprudence, Volume 11, p. 395, as follows:

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"Although a person may not be imprisoned for debt, it has been held that costs do not constitute a debt within the meaning of the constitutional inhibition. In every instance, it has been held, costs are paid, worked out, or collected in the same manner as the fine itself, and form a part and parcel of the judgment. Provision is made under all the statutes that relate to the subject for the enforcement of the collection of costs by incarcerating the party in jail, or working him on the public road and highways, or in the public work shops, or on the county poor farms, or by hiring him out, as the case may be. The person convicted of a misdemeanor may, in lieu of payment of costs, remain in jail for a sufficient length of time to discharge the amount adjudged against him. . . . Article 784 of the Code of Criminal Procedure provides 'where the punishment is . . . other than a fine, the judgment shall . . . adjudge the costs against the defendant, and order the collection thereof as in other cases.'"

In view of this provision, the State may recover the amount of fine and costs in the manner provided for, which may include several methods. It was intended by the use of the word "collection" in the latter part of Article 784, supra, not to restrict the collection of costs to an execution only, but to permit collection as in other misdemeanor cases. Under Article 783, and Article 784, above referred to, and in view of further provisions of the Code of Criminal Procedure, the defendant may be confined to jail for such time as will result in discharge of the costs, although the punishment is other than a fine, notwithstanding the fact that the case may be decided under the provision of Article 793 of the Code of Criminal Procedure, providing that where the defendant is convicted of a misdemeanor, and his punishment assessed at a fine, he may be put to work, as specified, or confined to jail for a sufficient length of time to discharge the amount of fine and costs.

Article 791, Code of Criminal Procedure, reads as follows:

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"In each case of pecuniary fine, an execution may issue for the fine and costs, tho a capias was issued for the defendant; and a capias may issue for the defendant tho an execution was issued against his property. The execution shall be collected and returned as in civil actions. When the execution has been collected, the defendant shall be at once discharged; and whenever the fine and costs have been legally discharged in any way, the execution shall be returned satisfied."

Article 919, Code of Criminal Procedure, provides:

"In each case of conviction before a justice from which no appeal is taken, an execution shall issue for the collection of the fine and costs, which shall be enforced and returned in the manner prescribed by law in civil actions before justices."

The last two statutes above quoted do not authorize the issuance of an execution against the property of a defendant who was present at the time the fine was imposed; and an order committing the defendant to the county jail until the fine and costs have been paid and directing an execution to issue at the same time is erroneous. This contention is upheld by the case of O'Conner vs. State, 40 Tex. 27, by the following language:

"We believe the judgment of the court committing the defendant to the county jail until the fine and costs were paid, and directing execution to issue therefor at the same time, was not authorized by law or sanctioned by the practice of the courts, and presume it was an error of the clerk to which the attention of the court was not called."

In the case of Ex parte Smith, 8 S.W. (2d) 139, we find the following language:

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"One convicted of a misdemeanor may, under the provisions of Article 793, Code of Criminal Procedure, lay out his fine and costs in jail."

Referring to Article 787, Code of Criminal Procedure, supra, we quote from Texas Jurisprudence, Volume 19, p. 650, as follows:

"Just as the primary object of the imposition of a fine is punishment, so the principal purpose of the imprisonment authorized by this statute is not so much to enforce payment as to insure punishment. The imprisonment contemplated by the statute is incarceration in jail, unless the convict is permitted to work out his fine in another place. The duration of the term of imprisonment is the same in either case."

Where the judgment against defendant is for fine and costs, he shall be discharged from the same when the amount thereof has been fully paid, when remitted by the proper authority, or when he has remained in custody for the time required by law to satisfy the amount thereof, and the person convicted of a misdemeanor may, in lieu of payment of costs, remain in jail for sufficient length of time to discharge the amount adjudged against him.

In view of the foregoing authorities, you are respectfully advised that it is the opinion of this department that when a defendant is convicted of a misdemeanor and is able to pay his fine and costs he may elect to satisfy the same by imprisonment in jail, and if the defendant does elect to satisfy his fine and costs by imprisonment in jail he is entitled to a credit on such fine and costs at the rate of \$3.00 per day. However, this opinion is not to be considered as construing the application of Article 920, C. C. P., which relates to Justice Courts. We are enclosing a copy of our opinion No. 1015 which construes Article 920, C. C. P.

Trusting that the foregoing fully answers your

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inquiry, we remain

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*  
Ardell Williams  
Assistant

AW:FG

APPROVED DEC 2, 1939

*George B. Mann*

ATTORNEY GENERAL OF TEXAS

